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**CHARLES ELMORE GROTH
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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 230

EDWIN CHARLES BEAUCHAMP,

Petitioner and Appellant,

vs.

THE UNITED STATES OF AMERICA,

Respondent and Appellee

PETITION FOR REHEARING

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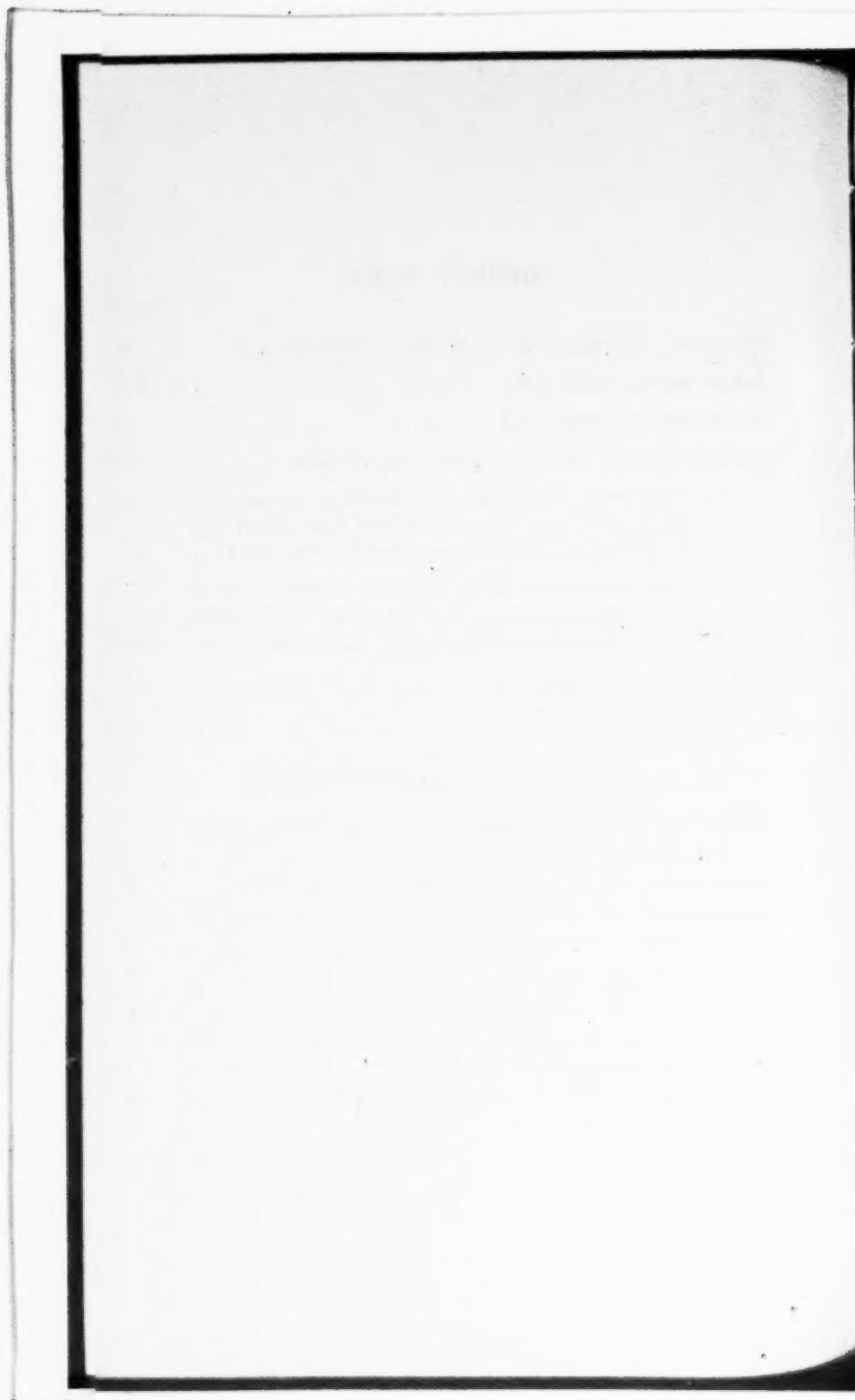


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*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court of
the United States:*

Petitioner Edwin Charles Beauchamp respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 14th day of October, 1946, denying his petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Counsel for petitioner, firmly believing in the merits of his cause, upon reflection, is convinced that his own ineptitude of expression and form provides proper ground for this court's action thereon. Rule 38(2), Supreme Court Rules. For this reason only is the present petition filed. For this reason solely do we seek this court's consideration, of the following as a proper presentation for the relief sought.

SUMMARY STATEMENT OF THE MATTER INVOLVED

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

A single count indictment charged Edwin Charles Beauchamp, petitioner herein with violation of Title 18, U. S. C. A. 94. Specifically, it accused petitioner, of aiding and assisting one who had deserted from the United States Army. It named Alexander White (Beauchamp's former employee at the Hub Auto Parts, in Pontiac, Michigan) as the deserter; and asserted that petitioner's assistance was rendered with knowledge that the said White had deserted (1-2).

Trial without jury was had (3). Thirteen witnesses, including the soldier Alexander White testified in behalf of the government. From none of them, nor from any exhibits introduced, did it appear that the soldier, Alexander White, had ever been accused, tried, or convicted by a military tribunal, of violating any provision of the Articles of War relating to the crime of desertion.

On the contrary it did appear that Alexander White had been inducted into the United States Army on July 9th, 1942 (10). In August of 1943, he returned to the vicinity of Pontiac on furlough (10, 16, 29). He stayed at the home of a friend, Bill Marotz, who was then employed by the

petitioner. Before the expiration of his furlough, this petitioner saw him; knew he became ill; knew he was taken to the United States military hospital at Selfridge Field, Michigan.

The next time the petitioner saw him was in November of 1943, when White appeared in civilian clothes; sought and obtained his old job back on the claim he had received a medical discharge from the army.

In February of 1944, Alexander White was arrested by Pontiac police officers at the telephoned request of Military Police in Detroit (105). It appears that a circular for the apprehension of stragglers or those failing to report to a United States Army camp had issued for White in September, 1943 (104).

Petitioner testified in his own behalf. He asserted good faith in his rehiring of Alexander White in November of 1943; as a soldier who had received a medical discharge from the army (91, 93, 98). He was supported by nine other witnesses, including Stanley White, brother of Alexander White, as well as the soldier Alexander recalled as a witness by trial counsel.

Motions made at the conclusion of the government's case (65) and again at the termination of all the testimony (130-133) sought to note the distinction between the military crimes of desertion and being A. W. O. L.

Petitioner was adjudicated guilty by the court (4) and sentenced to serve a period of twenty (20) months imprisonment; and to pay a committed fine in the amount of One Thousand (\$1,000.00) Dollars (4).

Thereafter, appeal was taken to the United States Circuit Court of Appeals for the Sixth Judicial Circuit (5-6). Oral argument was presented and the cause submitted on December 11, 1945 (145).

In an opinion (146-151) written by the Honorable District Judge Miller, then sitting by designation, the court below ruled adversely to petitioner's contentions. This was filed April 1, 1946 (146). The judgment affirming the District Court was likewise entered the same day (145).

A petition seeking rehearing was filed April 22, 1946 (153) and denied May 27, 1946 (165).

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question pursuant to section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Tit. 28 U. S. C. A. 347). Also see Rule 37(b)(1) of Federal Rules of Criminal Procedure, effective September 1, 1945.

The statute of the United States here involved is that portion of Section 42 of Criminal Code (18 U. S. C. A. 94), following the semi-colon. The entire statute reads as follows:

"Whoever shall entice or procure, or attempt or endeavor to entice or procure, any soldier in the military service, or any seaman or other person in the naval service of the United States, or who has been recruited for such service, to desert therefrom, or shall aid any such soldier, seaman, or other person in deserting or in attempting to desert from such service; or whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than \$2,000."

The judgment appealed from was entered on April 1, 1946 (145). Petition for rehearing was duly filed in the United States Circuit Court of Appeals for the Sixth Circuit on April 22, 1946 (153) and an order overruling the same filed on May 27, 1946 (165).

This is a criminal case in which the opinion of the Circuit Court of Appeals for the Sixth Circuit (146-151), in support of the judgment affirming conviction of petitioner herein by trial without a jury (145) involves a question of gravity and importance. The cases believed to sustain the jurisdiction are:

Brooklyn Savings Bank v. O'Neil, 65 Supreme Court 895, 324 U. S. 697;
Bollenbach v. U. S., 90 Law Edition 318, 326 U. S. 607;
Screws v. U. S., 89 Law Edition 1495, 325 U. S. 91.

THE QUESTION PRESENTED

Did the Circuit Court of Appeals for the Sixth Judicial Circuit, err in overruling petitioner's contention that until there had been an adjudication by the proper military tribunal, that the soldier involved was guilty of violating the Articles of War relating to desertion, the District Court was without jurisdiction to try the issue presented by the indictment.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I.

The Court below in its decision decided an important question of Federal law which has not been but should be settled by this Court.

This is evidenced by the approval of the procedure in *Firpo v. United States*, 261 Fed. 850 (149). In that case, decided by the Circuit Court of Appeals for the 2nd Circuit, there was in effect submitted as a proper jury question; whether or not the soldier involved was actually a deserter from the United States Army; in order to then determine guilt or innocence of the accused civilian. The opinion of the court below condoned this practice upon the part of the trial judge and by its consideration of the evidence did more; they held that the soldier here involved was a deserter from the army, and that petitioner had knowledge thereof (149-151).

This, in effect, results in the inescapable conclusion that concurrent jurisdiction exists in the District Courts and the Military Courts to determine guilt of the military crime of desertion.

Citation of authorities in support of the law relating to accessories (148), and application of constitutional safeguards to a civilian accused of crime (147) but ignore this fundamental error.

It is agreed (148), that a person in the military service who violates the Articles of War is only triable by the military courts; with equal unanimity must it be recognized that the practice and procedure of those courts is exclusively provided for by these Articles (10 U. S. C. A. 1471 etc.); such trials are not subject the constitutional or evi-

dentiary safeguards afforded civilians accused of crime, *Dynes v. Hoover*, 20 How. 65, *Ex Parte Quireen*, 317 U. S. 1; but do permit a finding of guilt of a lesser offense than the most serious charged, *Articles of War Annotated (Tillotson)*, (2nd), Rev. Ed. 1943, p. 124; to permit the opinion of the lower court to stand is in effect not only to repudiate the foregoing aphorisms but to add thereto a corollary; viz., except where a civilian is accused of aiding a soldier who the jury may believe should be found guilty of desertion. Clearly then this presents a case in which this court should exercise its discretionary powers to decide the extent to which such practice may be carried.

II.

The Circuit Court of Appeals decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Upon but one previous occasion did this Court have cause to take cognizance of this act. *Kurtz v. Moffitt*, 115 U. S. 487. The situation there presented did not necessitate final determination of the exact question here raised.

It there appeared that police officers of the City of San Francisco arrested Kurtz, a soldier of the United States Army as a deserter; held him in custody for the purpose of delivery to the United States military authorities—to be tried according to the laws of the United States.

A Petition for Writ of Habeas Corpus was filed by Kurtz in the local court. It was removed to the United States Court and by it remanded. Upon final hearing the California Court denied the Petition and returned Kurtz to custody.

After first affirming the Order remanding the cause to the State Court, Mr. Justice Gray, delivering the Opinion of this Court, logically reversed the State Court's final

determination thereof, on the basis that a civilian does not have any right to arrest and detain a member of the United States military service, except upon express authority of the proper military officers.

The distinction between civilian and military offenses comes to us as part of our heritage from the English Common Law. It was incorporated as a part of the Bill of Rights of the American Constitution. Distinctions as to procedure, trial and punishment were equally recognized by our progenitors in their earliest legislative enactments. Such was the supporting argument of Mr. Justice Gray in that case (pp. 498-504).

At page 502 did he have occasion to note that section of the Penal Code with which we are here concerned by stating, (it)

"* * * merely provides for the punishment of civilians, not subject to the Articles of War, who are accessories to the crime of desertion of a soldier, or who do any of the acts specified tending to promote his commission of that crime. It has no application to the crime of the soldier himself, and no tendency to show that he may be arrested by a private citizen without authority from a military officer. Indeed, the last clause above quoted has rather the opposite tendency."

This language relates properly, to that portion of the statute we are here discussing, preceding the semicolon. It cannot, nor can the learned Justice have contemplated its applicability to the latter portion thereof, viz., to a civilian who aids a soldier, knowing that he had deserted. Plain reading of the entire context supports this conclusion. Greater vehemence is added by Mr. Justice Gray's reference to such civilians "* * * accessories to the crime of desertion by a soldier * * *."

With this thought in mind does petitioner urge that under a situation as is here presented, *Kurtz v. Moffitt (supra)* may properly be cited as dicta for his position.

This is supported by recognition of certain fundamental precepts: notably (a) desertion from our armed forces is comparable to treason; (b) a civilian who knowingly aids such a traitor cannot be tried by the military tribunal; (c) in the absence of such a penal statute, such a civilian could not be tried at all; (d) our enemies may reside within our national boundaries; (e) give this venomous aid, again and again without fear of any prosecution or punishment whatsoever; hence Congress enacted this measure to insure prosecution and punishment of the civilian who might entice a soldier to desert; or should he meet one who had deserted; lend aid and succor to him.

Wherefore, it is respectfully requested that the order denying certiorari, heretofore entered, be vacated; and that upon consideration of the instant petition a Writ of Certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Sixth Circuit as provided for by the Statutes of the United States and the Rules of this Honorable Court.

HENRY S. SWEENEY,
1114-18 Buhl Building,
Detroit 26, Michigan,
Attorney for Petitioner.

DONALD B. FREDERICK,
Of Counsel.

CERTIFICATE OF COUNSEL

I, Henry S. Sweeny, attorney for the above named, Edward Charles Beauchamp, petitioner herein, by Donald B. Frederick, of counsel, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

.....
Henry S. Sweeny
Attorney for Petitioner.

By.....
Donald B. Frederick
Of Counsel.